IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 150

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY AND MUNICIPAL SECURITIES COMPANY, INC.,

Petitioners,

v.

NEW YORK STOCK EXCHANGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Citations

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To The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Harold J. Silver, d/b/a Municipal Securities Company,[1] and Municipal Securities Company, Inc., petitioners herein, pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that court entered April 6, 1962, which reversed the action of the District Court granting petitioners' motion for summary judgment permanently enjoining respondent from interfering with private wire and telemeter connections between its members and petitioners.

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[1] Harold J. Silver died on October 2, 1961. By order dated December 4, 1961, Evelyn B. Silver, as executrix of the estate of Harold J. Silver, was substituted as a plaintiff-appellee below (R. 306).

Opinions Below

The opinion of the Court of Appeals has not been officially reported, but is set out in Appendix A, *infra*, at pages 18-35. The opinion of the District Court is reported at 196 F. Supp. 209 (S. D. N. Y., 1961) and is set out at pages 126-166 of the appendix as printed for the use of the Court below.[2]

Jurisdiction

The judgment of the court below was entered April 6, 1962 (R. 344). The jurisdiction of this Court is invoked under 28 U. S .C. § 1254(1).

Statement of Questions Presented

1. Do the provisions of Section 6 and 19(b) of the Securities Exchange Act of 1934, 48 Stat. 885, 889, 15 U. S. C. §§ 78f and 78s(b), immunize from the antitrust laws those provisions of the constitution and rules of a registered securities exchange by which said exchange is authorized to and does arbitrarily restrain the exercise of a member firm's freedom to establish and maintain private wire connections with non-members for the purpose of trading and communicating with respect to transactions in securities not listed for trading on said exchange?

2. Do the provisions of Section 6 of the Securities Exchange Act of 1934, 48 Stat. 885, 15 U. S. C. § 78f, which require a securities exchange to make and enforce rules against members who engage in conduct inconsistent with just and equitable principles of trade and willful violation of provisions of the Securities Exchange Act, immunize

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[2] In the court below, respondent's appendix was numbered 1-109 and petitioners' appendix was numbered 171-263. These appendices are now combined and hereinafter shall be referred to as "J.A.", *i.e.*, joint appendix.

from the antitrust laws exchange action not directed against derelictions of members, but against non-member over-the-counter securities dealers who maintain private wire connections with members?

3. Assuming, *arguendo*, that a registered securities exchange is immune from the antitrust laws for action taken in accordance with its rules filed under Section 6 of the Securities Exchange Act of 1934, does such immunity extend to arbitrary or unreasonable exchange action requiring exchange members to cease maintaining private wire connections with non-member over-the-counter securities dealers?

Statutory Provisions Involved

The statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1 and 2; Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26; and Sections 6 and 19(b) of the Securities Exchange Act of 1934, 48 Stat. 885, 898, 15 U. S. C. §§ 78f and 78s(b).

The pertinent portions of these statutes are set forth in Appendix B, *infra*, at pages 36-39.

Statement of the Case

The District Court made extensive findings with respect to those facts about which no genuine dispute existed (J.A. 128-136, 155-159). These findings were left undisturbed by the Court of Appeals (Appendix A, *infra*, pp. 19-32).

A. Parties and Cause of Action.

Petitioner Municipal Securities Company (hereinafter referred to as "MSC") is a sole proprietorship engaged in the securities business. Virtually all of its activities are concerned with municipal bond transactions. Petitioner Municipal Securities Company, Inc. (hereinafter referred

to as "MSC, INC."), a corporation organized under the laws of the state of Texas, is also engaged in the securities business, principally in over-the-counter securities (J.A. 128). Petitioners MSC and MSC, Inc. are licensed as securities dealers under the laws of the state of Texas and are registered as broker-dealers with the Securities and Exchange Commission (SEC). Both petitioners are members in good standing of the National Association of Securities Dealers (NASD) (J.A. 21, 24, 28).

Respondent New York Stock Exchange (hereinafter referred to as "NYSE" or the "Exchange") is an unincorporated association with an authorized membership of 1375. It provides facilities for its members and their firms to transact business in corporate securities listed for trading by the Exchange. While actual trading takes place on the exchange floor in New York, its members do business nationwide. It is the largest and most important of the national stock exchanges (J.A. 21, 67, 127).[3]

The complaint alleges, *inter alia*, a conspiracy between the NYSE and various of its member firms (named as co-conspirators, but not as parties) to deprive petitioners of private wire and telemeter connections with such member firms and of the NYSE's stock ticker service, all to petitioners' substantial competitive disadvantage in violation of the Sherman Act, 15 U. S. C. § 1, *et seq.* (J.A. 2, 127).

B. The Undisputed Material Facts.

Prior to February 12, 1959, petitioners had private wire connections with NYSE members firms which were used

[3] The District Court found: "The [NYSE] lists select corporate securities which include those of many of the country's largest and most important corporations. It provides a quality market for its members to execute orders for the purchase and sale of securities so listed for their own accounts and for the accounts of customers" (J.A. 129).

to trade, and communicate with respect to transactions, in securities not listed for trading on the New York Stock Exchange (J.A. 30, 31, 47-48, 240). On February 12, 1959, without notice to petitioners, the NYSE instructed its member firms to discontinue these wires (J.A. 32, 62, 180). By March 2, 1959, all private wire connections between petitioners and NYSE member firms were discontinued (J.A. 34, 49-50, 65, 66-67). The District Court's "inescapable conclusion from what [was] relied on by the Exchange in justification [was] that [the Exchange] acted arbitrarily and unreasonably in directing that plaintiffs' wire connections be severed" (J.A. 159).[4]

C. Proceedings Below.

Petitioners commenced this action on April 3, 1959 by filing a complaint in the United States District Court for the Southern District of New York (J.A. 1). Jurisdiction was based on diversity of citizenship and the Federal antitrust laws (J.A. 3). After answer (J.A. 14) and extensive discovery by both sides (J.A. 139), petitioners moved for partial summary judgment (J.A. 17). Petitioners' motion was granted on May 19, 1961 (J.A. 124) and, on June 18, 1961, the District Court filed a written opinion containing its findings of fact and conclusions of law (J.A. 126).

The District Judge held that (1) the Securities Exchange Act of 1934 "requiring an exchange to file its constitution and rules and to register are not a substitute for nor do they supersede the anti-trust laws" (J.A. 148); and (2) providing "that its members do not indulge in conduct which is illegal or inconsistent with just and equitable principles of trade, an exchange has neither the power

[4] The Court of Appeals did not disturb this finding. It said: "Whatever conclusion one might reach on this issue, the procedure of the Exchange in failing to give prior notice of its action and in refusing to inform Silver of the charges made against him and to give him an opportunity to rebut these charges may well be characterized as arbitrary" (Appendix A, *infra*, p. 31).

nor the authority to determine with whom its members may or may not deal or to direct them to desist from dealing with non-member broker/dealers engaged in transactions in over-the-counter securities and municipals. If it does so it does so at its peril and is subject to such appropriate action as may be taken under the anti-trust laws" (J.A. 149-150).

On August 3, 1961, the District Court entered an order which, *inter alia*, permanently enjoined respondent under Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26, "from preventing, prohibiting and interfering with the establishment, maintenance and operation of private wire and telemeter connections between [petitioners] and [respondent's] member firms and member corporations for the purpose of trading or otherwise dealing or communicating with respect to transactions, *in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange*" (J.A. 167-168).[5]

Respondent filed a notice of appeal on August 31, 1961 (J.A. 169). Thereafter, and on April 6, 1962, the Court of Appeals reversed the action of the District Court by a 2 to 1 vote (Appendix A, *infra*, pp. 18-32). Judge Waterman, dissenting, stated: "I would affirm on the opinion of Judge Bryan below, reported at 196 F. Supp. 209 (S. D. N. Y., 1961)".[6]

Reasons for Granting the Writ

The issues presented by this case raise questions of fundamental importance to the regulation and control of exchange and over-the-counter securities markets, to thousands of securities dealers who are not members of securi-

[5] Emphasis supplied.

[6] Appendix A, *infra*, p. 32.

ties exchanges, and to the administration of both the Securities Exchange Act of 1934 and the Sherman Antitrust Act. The court below held that action by the New York Stock Exchange arbitrarily prohibiting its members from doing business with non-member broker-dealers in both listed and over-the-counter securities was immune from the antitrust laws (Appendix "A", *infra*, p. 30). Since a non-member aggrieved by Exchange action purportedly taken under its filed rules has no administrative remedy before the SEC (J.A. 148),[7] the effect of the decision below is to vest in the New York Stock Exchange power to determine the life or death of non-member over-the-counter securities dealers, to the exclusion of the only agencies charged with responsibility in such matters—the SEC and NASD.

The antitrust immunity issues which this Court is asked for the first time to decide, arise from Section 6 of the Securities Exchange Act of 1934, 15 U .S. C. § 78f, which requires a registered securities exchange to make and enforce rules for the discipline of its *members* for conduct inconsistent with "just and equitable principles of trade" and the willful violation of any provisions of the Act or any rule or regulation adopted thereunder. Or, to paraphrase the opinion of Judge Bryan in the District Court:

> "• • • [whether] the provisions of the [Securities Exchange] Act requiring an Exchange to file its constitution and rules and to register are • • • a substitute for [or] supersede the anti-trust laws." (J.A. 148)

On all the questions below, the Court of Appeals was divided. Petitioners contend with Judge Waterman, that the majority erred. Petitioners' challenge is based on the proposition that Congress did not entrust the national

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[7] The SEC's General Counsel so advised the court below during oral argument.

securities exchanges with general regulatory control over all phases of the securities business and, insofar as any rules required to be filed by a national securities exchange (1) authorize arbitrary action or (2) attempt to regulate non-members in the over-the-counter securities market, there is no repugnancy between the provisions of the Securities Exchange Act of 1934 and the antitrust laws.

I

The Court Below Has Decided Important Questions Of Federal Law Which Have Not Been, But Should Be, Resolved By This Court.

(a) Section 6(c) of the Securities Exchange Act of 1934, 15 U. S. C. § 78f(c), which permits the NYSE to adopt and enforce any rule not inconsistent with the Act and the SEC's rules and regulations thereunder, must be read together with Section 19(b). That section authorizes the SEC to request an exchange to make "specified changes in its rules and practices." If, after notice and hearing upon the exchange's refusal, the SEC finds such changes necessary to protect investors "or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange," "it may supplement or alter the exchange's rules" "in respect of such matters as * * * (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange * * *" 15 U. S. C. § 78s(b). The Court of Appeals held that since the NYSE's "wire connection rule"[8] was filed with the SEC, the NYSE's authority to adopt and enforce it under Section 6(c), plus the SEC's power to "alter" or "supplement" it under Section 19(b),

[8] NYSE Constitution, Art. III, Section 6, Rules 355, 356 and 358, par. 2358.13 (J.A. 205, 207-209).

disclosed a congressional intention to provide an immunity from the antitrust laws for all action taken by the NYSE in accordance therewith (Appendix A, *infra,* pp. 23-27).

The District Court held that the applicable provisions of the NYSE's constitution and rules "purport to confer upon the Exchange an absolute power to approve or disapprove all wire connections and ticker service with nonmember firms and to require that such connections and services be discontinued in its absolute and uncontrolled discretion" (J.A. 134). Accordingly, and unless otherwise exempted, these provisions of the NYSE's constitution and rules were in violation of the Sherman Act. *Associated Press* v. *United States,* 326 U. S. 1 (1945); *Anderson* v. *Ship Owners' Association of Pacific Coast,* 272 U. S. 359, 364-365 (1926).

The District Court also held that "the provisions of the Securities Exchange Act requiring an Exchange to file its constitution and rules and to register are not a substitute for nor do they supersede the antitrust laws" (J.A. 148). Judge Bryan said:

> "The SEC does not give affirmative sanction to the rules filed by national exchanges. Its grant of registration to an exchange goes no farther than to indicate that the rules filed meet the minimum standards required of exchanges by the statute so as to insure that its members will comply with the provisions of the law and shall not conduct themselves in a manner inconsistent with just and equitable principles of trade. Moreover, and equally important, there is no procedure by which a nonmember aggrieved by action of the Exchange purportedly taken under its filed rules, may resort to administrative proceedings before the SEC to redress his grievances or to attack the rules themselves, either at the time of filing or thereafter. * * * If the theory of the Exchange were correct these plaintiffs would not only have no remedy before the Commission but would find themselves barred

> from remedy in the courts also on the mere say-so of a private association. This is in marked contrast to what occurs in a recognized closed regulatory system." (J.A. 147-148)

Regulated industries are not *per se* exempt from the Sherman Act. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456-457 (1945). And if a statutory exemption is provided, it is strictly construed. In such cases, the exemption is granted only insofar as necessary to effect the legislative purpose. For example, in *United States* v. *Borden Co.*, 308 U. S. 188 (1939) and *Maryland & Virginia Milk Producers Association* v. *United States*, 362 U. S. 458 (1960), "this Court could not assume that Congress having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one." *California* v. *Federal Power Commission*, 30 Law Week 4293, 4294 (1962). There is no exemption in the Securities Exchange Act itself. *United States* v. *Morgan, et al.*, 118 F. Supp. 621, 697 (S. D. N. Y., 1953). Yet the Court below assumed that Congress granted, not a limited exemption from the antitrust laws, but "an overall inclusive one."

In holding that the provisions of the Securities Exchange Act requiring an Exchange to file its constitution and rules and to register supersede the antitrust laws (Appendix A, *infra*, p. 27), the Court of Appeals held that securities exchanges were exempted from the Sherman Act, *per se*. This is an important question of Federal law which has not been, but should be, resolved by this Court.

(b) The basis for the Court of Appeals' holding that exchange action prohibiting its member firms from maintaining private wire connections with non-members for the purpose of transacting business in over-the-counter securities was immune from the Sherman Act (Appendix A, *infra*, pp. 27-30) was stated to be as follows:

> "The structure of the Securities Exchange Act of 1934 and its legislative history disclose that the

> Act was designed to require that the Securities and Exchange Commission share with the Exchanges themselves the governance of those matters which the Act regulates" (Appendix A, *infra*, p. 27).

This statement, while clearly correct with respect to Exchange members effecting transactions in the exchange and over-the-counter markets, is *clearly wrong* with respect to non-members effecting transactions in the over-the-counter market.[9]

Moreover, since petitioners were competing in the over-the-counter market with each of the Dallas member-firms with whom they had private wire connections (J.A. 50-51, 104-105), it is irrelevant that the statute gives the Exchange disciplinary powers over exchange members "with respect to their transactions in over-the-counter securities and that the policy of the statute requires that the Exchange exercise these powers fully" (Appendix A, *infra*, p. 30). The Sherman Act is violated, not only when competitors restrain independent action among themselves (*Anderson*

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[9] As distinguished from the exchange markets, the burden of policing the over-the-counter securities markets is not one which the SEC shares with the exchanges. 2 Loss, *Securities Regulation*, 1359-1364 (1961). Insofar as over-the-counter securities activities by non-exchange members are concerned, regulation is conducted in the first instance by the SEC through the broker-dealer registration provisions of the Securities Exchange Act of 1934. 48 Stat. 895, 15 U. S. C. § 78*o*. This is supplemented by a program of self-regulation administered by registered securities dealers associations in the field of business ethics, *i.e.*, discipline for conduct inconsistent with just and equitable principles of trade. 52 Stat. 1070, 15 U. S. C. § 78*o*-3. The economic sanctions which could be imposed by this supplementary method were believed so serious and yet so vital to any effective scheme of self-regulation that Congress provided these associations a specific exemption from the antitrust laws—an exemption which was to be effective solely in this narrow area. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 227, ftn. 60 (1940); *International Association of Machinists* v. *Street*, 367 U. S. 740, 809, ftn. 16 (1961); *United States* v. *Morgan, et al.*, 118 F. Supp. 621, 697 (S. D. N. Y., 1953).

v. *Shipowners' Association of Pacific Coast,* 272 U. S. 359, 364-365 [1926]), but also when they foreclose another competitor from any substantial market. *E.g., International Salt Co.* v. *United States,* 332 U. S. 392, 396 (1947); *Associated Press* v. *United States,* 326 U. S. 1, 13-14 (1945); *Fashion Originators' Guild* v. *FTC,* 312 U. S. 457, 465 (1941).

Petitioners did not contend that the NYSE was without authority to discipline its members for derelictions in over-the-counter transactions. And the District Court did not so hold. It held that Exchange action which is directed, not against member derelictions in over-the-counter transactions, but against non-member over-the-counter securities dealers who maintain private wires with members, "was subject to such appropriate action as may be taken under the anti-trust laws" (J.A. 149-150). In holding to the contrary (Appendix A, *infra,* pp. 27-30), the Court of Appeals decided an important question of Federal law which has not been, but should be, resolved by this Court.

(c) Even "arbitrary or unreasonable" exchange action taken in accordance with rules filed pursuant to Section 6 of the Securities Exchange Act of 1934, was held immune from the antitrust laws (Appendix A, *infra,* p. 30). This holding was rationalized as follows:

> "If securities exchanges were in constant danger of subjecting themselves to liability under the antitrust laws for any misapplication of their disciplinary powers, they would understandably be reluctant to fulfill their obligations under the Securities Exchange Act." *Ibid.*

Since the court below held that "if the action of the Exchange was arbitrary or unreasonable [petitioners are not] without a remedy" on some other theory (Appendix

A, *infra*, pp. 30-31),[10] it had to assume that Congress delegated to national securities exchanges power to act arbitrarily or unreasonably only insofar as the antitrust laws were concerned.[11] The dichotomy of purpose attributed below to Congress finds support neither in the statute nor its legislative history and can be based only on the notion that Congress believed that liability under the Sherman Act, but not under some other law, "would go far toward defeating the statutory policy of self-regulation" (Appendix A, *infra*, p. 30). This is untenable. Securities exchanges would be reluctant "to fulfill their obligations under the Securities Exchange Act" if subject to liability under any law.

In *Maryland & Virginia Milk Producers Association* v. *United States*, 362 U. S. 458, 466-472 (1960), this Court held that Section 6 of the Clayton Act, 15 U. S. C. § 17, exempting agricultural organizations from the antitrust laws, does not grant such organizations immunity "to engage in predatory trade practices at will." In this case, although Congress provided no exemption from the antitrust laws in the Securities Exchange Act of 1934 itself, the court below held that "arbitrary or unreasonable" exchange action was immune from the antitrust laws. This is an important question of Federal law which has not been, but should be, resolved by this Court.

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[10] The Court of Appeals did not identify the "remedy" and remanded the case to give the District Court an opportunity to fashion one (Appendix A, *infra*, pp. 31-32).

[11] In this one respect, the court below did not merely impute to Congress a purpose to delegate to securities exchanges unbridled discretion to grant or withhold private wire connections for any substantive reason they might choose—something this Court would hesitate to do. *Kent* v. *Dulles*, 357 U. S. 116, 128 (1958). It went further, and imputed to Congress a purpose to delegate to securities exchanges a power to exercise such discretion arbitrarily or unreasonably—something this Court will not permit it to do. *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 898 (1961); *Harmon* v. *Brucker*, 355 U. S. 579, 581-582 (1958).

II

The Decision Of The Court Below Is In Conflict With The Applicable Decisions Of This Court.

(a) In holding that Exchange action, not directed against derelictions of members, but against non-member over-the-counter securities dealers who maintain private wire connections with members, was exempt from the Sherman Act, the Court of Appeals provided the NYSE a blanket immunity from the antitrust laws (Appendix A, *infra*, pp. 27-30). This holding is in direct conflict with this Court's decisions in a number of cases. It is also in conflict with the views expressed by Judge Waterman's dissent (Appendix A, *infra*, pp. 32-35) and by the SEC, as *amicus curiae*, below.[12]

In *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945), Sections 1(4) and (6) of the Interstate Commerce Act, 49 U. S. C. §§ 1(4) and (6), required railroads to establish joint through rates in agreement with other railroads. Since these rates were subject to regulation by the ICC, the railroads contended that, although no specific antitrust immunity was provided, Congress intended to substitute regulation by the ICC in place of regulation by competition under the antitrust laws (324 U. S., at 457-459). This Court held that there was no clear repugnancy between the Sherman Act and the Interstate Commerce Act with respect to the rate-making conspiracy there involved and that the railroads were not exempt from the antitrust laws (324 U. S., at 456-460). In this case, the District Court made clear that "there is not the slightest indication of a congressional intent to grant any exemption from the

[12] The SEC expressed the view below that "exchange action, not properly related to the performance of its duty to discipline its members, should subject it to liability to a non-member if it violates the anti-trust laws. Exchanges do not enjoy any blanket immunity, expressly or impliedly, from such laws" (Br., p. 11).

antitrust laws with respect to the acts with which we are concerned here" (J.A. 147-150). Judge Waterman agreed (Appendix A, *infra*, p. 35).

For these reasons, as well as for those previously set forth (*supra*, pp. 10-12), the decision below is in direct conflict, not only with *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456-460 (1945), but also with this Court's decisions in *United States* v. *Borden Co.*, 308 U. S. 188, 198-199, 201-202 (1939) and *Maryland & Virginia Milk Producers Association* v. *United States*, 362 U. S. 458, 466-472 (1960).

(b) The Court of Appeals held that the NYSE's "wire connection rule,"[13] pursuant to which the NYSE restrains, and is authorized to restrain arbitrarily, the exercise of a member firm's freedom to establish and maintain private wire connections with non-members for the purpose of trading and communicating with respect to transactions in securities not listed for trading on the Exchange, was immunized from the antitrust laws by reason of (1) the SEC's power to amend it under Section 19(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78s(b), and (2) the SEC's failure to take action to do so (Appendix A, *infra*, p. 27).

Section 19(b) does not authorize the SEC to alter or amend an exchange rule with respect to private wire connections between members and non-members utilized for trading in securities *not* listed for trading on such exchange. 15 U. S. C. § 78s(b)(8). Assuming, *arguendo*, that it does, nothing in either the Securities Exchange Act or its legislative history reveals that the SEC was given power to decide antitrust issues as such, or that SEC inaction was intended to prevent enforcement of the antitrust laws in the courts.

For these reasons, as well as for those previously set forth (*supra*, pp. 8-10), the decision below is in direct

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[13] Op. cit., *supra*, ftn. 8.

conflict with this Court's decisions in *United States* v. *Radio Corporation of America*, 358 U. S. 344, 346 (1959) and *California* v. *Federal Power Commission*, 30 Law Week 4293, 4294 (1962).

Conclusion

Congress was scrupulous in providing administrative "due process" to broker-dealers subject to registration revocation or other disciplinary proceedings under the Securities Exchange Act (see, *e.g.*, Sections 15(b), 15-A(b)(9), (g) and (h) of the Act, 48 Stat. 895, 52 Stat., 1070, 15 U. S. C. §§ 78*o*(b), 78*o*-3(b)(9), (g) and (h)). In contrast, the NYSE's Constitution and Rules, which provide elaborate procedural safeguards for members (J.A. 206-207), provide no procedural safeguards for *non-members* (J.A. 187). This was one reason why Congress chose not to authorize the exchanges to promulgate rules prohibiting members from dealing with non-members and why power to regulate the activities of non-member over-the-counter dealers was vested in the SEC and NASD exclusively. In expressing this choice, Congress permitted the NASD, a private association sharing responsibility with the SEC in policing the over-the-counter market, to promulgate rules in effect prohibiting members from dealing with, or providing services to, non-members, and granted that association an immunity from the antitrust laws.

The Court of Appeals turned this pattern of regulation on its head. Since a non-member aggrieved by exchange action purportedly taken under its filed rules has no administrative remedy before the SEC, the effect of the decision below is to vest in the securities exchanges power to determine the life or death of non-member over-the-counter dealers, to the exclusion of the SEC and NASD.

The questions petitioners raise are of fundamental importance both to antitrust enforcement in the regulated industry-antitrust field and to the administration of the Securities Exchange Act. With questions this important, with a misapplication of the applicable decisions of this Court so obvious, and with the court below so sharply divided—surely these are questions that this Court should decide.

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 208—September Term, 1961.

(Argued February 7, 1962 Decided April 6, 1962.)

Docket No. 27211

HAROLD J. SILVER, doing business as Municipal Securities COMPANY, and MUNICIPAL SECURITIES COMPANY, INC.,
Plaintiffs-Appellees,

v.

NEW YORK STOCK EXCHANGE,
Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*

WATERMAN and HAYS, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Frederick vP. Bryan, *Judge,* granting plaintiffs' motion for summary judgment permanently enjoining defendant under Section 16 of the Clayton Act from interfering with private wire and telemeter connections between its members and plaintiffs.

Appendix A

Reversed and remanded for further proceedings.

DAVID I. SHAPIRO, of Dickstein, Shapiro and Galligan, New York, N. Y. (Goldberg, Fonville, Gump and Strauss, Dallas, Texas, on the brief), *for plaintiffs-appellees.*

A. DONALD MACKINNON, of Milbank, Tweed, Hope and Hadley, New York, N. Y. (Edward J. Reilly, Jr., Squire N. Bozorth, on the brief), *for defendant-appellant.*

PETER A. DAMMANN, General Counsel, Securities and Exchange Commission, Washington, D. C. (David Ferber, Associate General Counsel, Walter P. North, Assistant General Counsel, Faith Colish, Attorney, on the brief), *for the Securities and Exchange Commission, amicus curiae.*

HAYS, *Circuit Judge*:

This is an action for damages and injunctive relief brought under Sections 4 and 16 of the Clayton Act. The principal issue is whether defendant by instructing its members to deny private wire service to the plaintiffs engaged in an activity prohibited by Section 1 of the Sherman Act. The lower court, granting plaintiffs' motion for summary judgment, held that defendant's action constituted a concerted refusal to deal which was *per se* unlawful, and gave plaintiff a permanent injunction. 196 F. Supp. 209 (S. D. N. Y. 1961). This is the order from which the present appeal is taken. We reverse on the ground that the defendant acted in pursuance of powers granted to it by the Securities Exchange Act of 1934.

The plaintiffs, Municipal Securities and Municipal Securities, Inc. are engaged in the securities business in Dallas,

Texas. Municipal Securities deals almost exclusively in municipal bonds, Municipal Securities, Inc. in over-the-counter corporate securities. They are not members of the New York Stock Exchange. Harold J. Silver was, until his death, sole proprietor of Municipal Securities. He and his wife were the principal officers and directors of Municipal Securities, Inc.

In June, 1958, Municipal Securities, Inc. applied to the New York Stock Exchange for approval of private wire connections[1] with several offices of firms which were members of the Exchange.[2] The Exchange gave "temporary approval" to the proposed arrangement and the connections were installed.

Following its usual practice in such cases the Exchange ordered an investigation of Municipal Securities, Inc. and its officers. The investigation revealed several matters which appeared to the Exchange to have a bearing on whether approval of the application of Municipal Securities, Inc. should be made permanent. According to the Exchange, plaintiff Silver, in providing the information requested by the Exchange in connection with his application, had failed to list two corporations with which he and his wife had been connected, the Defense Department had suspended the security clearance of Silver and his wife and of another corporation in which the Silvers held a major interest, the Silvers had "apparently" breached an agreement involving the exchange of certain shares of stock, and there were "further disclosures of a derogatory nature."

On February 12, 1959, relying upon the results of its investigation and without notice to Municipal Securities,

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[1] Private wires, as used here, means direct telephone and telemeter connections.

[2] Municipal Securities, without applying for such approval, had at an earlier date established private wire connections with other member firms.

Inc., the Exchange "requested" its members to discontinue the private wire connections with Municipal Securities, Inc. They did so.

The results of the investigation were disclosed only in the course of the proceedings in the lower court, and, then, according to the Exchange, only in part. Silver's attempts to learn from the Exchange the reasons for the cancellation of the wire services were unavailing. He was informed that the practice of the Exchange did not permit the disclosure of this information.

The lower court held that the action of the Exchange and its members constituted a concerted refusal to deal which violated Section 1 of the Sherman Act and was illegal *per se*.

It is quite clear that there would be, at the very least, a grave doubt as to the legality of the action of the defendant if it is not insulated from liability under the Sherman Act for such action by reason of the duties and obligations imposed upon it by the Securities Exchange Act of 1934. We hold, however, that the action of the Exchange in bringing about the cancellation of the private wire connections with members of the Exchange was within the general scope of the authority of the Exchange as defined by the 1934 Act and therefore outside the coverage of the Sherman Act.

The broad scope of the Securities Exchange Act is indicated by Section 2, Necessity for Regulation, which reads in part as follows:

> "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, * * * and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to

protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions."

The basic scheme of the Act contemplates that control over the conduct of members of securities exchanges will be shared by the Securities and Exchange Commission and the securities exchanges themselves, with the Commission exercising general supervisory power over the exchanges' self-regulation. The report on stock exchange regulation by the so-called Dickinson Committee which, at the request of the President and in collaboration with the Senate Committee on Banking and Currency, formulated the fundamental plan for the legislation in this field, stated:

> "It is not proposed that the Government so dominate exchanges as to deprive these organizations of initiative and responsibility * * * [We propose the formation of] a Government agency operating in this field, and endowed with wide powers to license or close exchanges, coupled with the reserve power to license individual brokers * * * , and to make rules and regulations concerning a delicate mechanism like the stock exchange [which] must be * * * so constituted as to place responsibility to the fullest extent possible on the private bodies now handling the work of security exchanges."
>
> "[I]t seems distinctly better, in the opinion of your committee, to stimulate the exchange to further disciplinary activity by holding it to a high degree of accountability for the conduct of [its] members."[3]

[3] Stock Exchange Regulation—Letter of Transmittal from the President of the United States to the Chairman of the Committee on Banking and Currency with an Accompanying Report Relative to Stock Exchange Regulation, Senate Committee Print, 73rd Cong., 2d Sess. (1934) pp. 6, 7, 8.

Appendix A

The House Committee Report on the bill which became the 1934 Act said:

> "It is hoped that the effect of the bill will be to give to the well-managed exchanges that power necessary to enable them to effect themselves needed reforms and that the occasion for direct action by the Commission will not arise."[4]

The Senate Committee Report said:

> "Thus the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so"[5]

The structure of the Act bears out this purpose. Section 6(a) requires an exchange upon registering with the Commission to file a registration statement containing "an agreement * * * to comply, and to enforce so far as it is within its powers compliance by its members, with the provisions of" the Act and the Commission's rules and regulations thereunder. Section 6(a)(3) requires the filing with the Commission of copies of the constitution of the Exchange, and its rules. The Exchange must provide "an agreement to furnish to the Commission copies of any amendments to the rules of the Exchange forthwith upon their adoption." (Section 6(a)(4.) The rules of the Exchange must "include provision for the expulsion, suspension or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade," and must be "just and adequate to insure fair dealing and protect investors." (Section 6(d).)

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[4] H. R. Rep. No. 1383, 73rd Cong., 2d Sess. 15 (1934).

[5] S. Rep. No. 792, 73rd Con., 2d Sess. 13 (1934).

Appendix A

Under Section 19 the Commission is authorized "if in its opinion such action is necessary or appropriate for the protection of investors—

"(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this chapter or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon."

Section 19(b) provides:

"The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof;

(3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."

In accordance with the requirements of the Act, the constitution and rules of the defendant New York Stock Exchange were filed with the Commission. Article III, Section 6, of the constitution provides that the Board of Governors of the Exchange "shall have supervision over all matters relating to the collection, dissemination and use of quotations and of reports of prices on the Exchange and shall have the power to approve or disapprove any application for ticker service to any non-member, or for wire, wireless, or other connection between any office of any member of the Exchange, member firm or member corporation and any non-member, and may require the discontinuance of any such service or connection."

Rules 355 and 356 as they read in 1958 provided:

"Rule 355. (a) No member or member organization shall establish or maintain any wire connection, private radio, television or wireless system between his or its offices and the office of any non-member, or permit any private radio or television system be-

tween his or its offices, without prior consent of the Exchange.

(b) Every non-member will be required to execute a private wire contract in form prescribed by the Exchange to be filed with it, unless a contract is already on file with the Exchange.

(c) Notification regarding a private means of communication with a non-member and the signed contract when necessary shall be submitted to the Department of Member Firms. This notification, by a member or allied member, may be in form supplied by the Exchange or in letter form, and shall include the essential facts concerning the non-member and the means of communication.

(d) Each member or member organization shall submit annually to the Department of Member Firms a list of all non-members with whom private means of communication are maintained.

(e) The Exchange may require at any time that any means of communication be discontinued.

Rule 356. The Exchange may require at any time the discontinuance of any means of communication whatsoever which has a terminus in the office of a member or member organization. * * * "

As Judge Clark said in *Baird* v. *Franklin*, 141 F. 2d 238, 244 (2d Cir.), cert. denied, 323 U. S. 737 (1944), the Act makes it the duty of the Exchange to enforce the rules which it is required to file with the Commission.

"There can be no doubt that §6(b) places a duty upon the Stock Exchange to enforce the rules and regulations prescribed by that section. Any other construction would render the provision meaningless. Defendant's argument that the Securities Exchange

Act did not alter the prior status of the Stock Exchange Rules as by-laws of a private club is untenable. If all that §6(b) meant was that every exchange should pass token regulations, incapable of enforcement except at the wish of the exchange itself, there would have been no purpose for its inclusion in the Act. Sections 6(b) and (d) were surely intended to be read together, and the latter makes it clear that the purpose of the requirements of the former is 'to insure fair dealing and to protect investors.' This can be realized only if §6(b) is construed as imposing the two-fold duty upon an exchange of enacting certain rules and regulations and of seeing that they are enforced.''[6]

See also 2 Loss, Securities Regulation 1178 (1961).

To summarize: The structure of the Securities Exchange Act of 1934 and its legislative history disclose that the Act was designed to require that the Securities and Exchange Commission share with the exchanges themselves the governance of those matters which the Act regulates. The constitution and rules of the New York Stock Exchange are filed with the Commission. It is reasonably to be presumed that those regulations have the approval of the Commission since it has not taken the action which it is empowered by the statute to take to bring about their amendment. The Exchange is required by virtue of the statute to enforce its rules. As long as the Exchange acts within the scope of its statutory authority in the enforcement of its rules its action cannot be condemned as within the prohibitions of the Sherman Act.

But, it is argued, and the lower court held, that the Exchange exceeded its authority in the present case in

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[6] While Judge Clark dissented on another issue, his statement on this point reflected the view of the Court.

acting with respect to dealings in over-the-counter securities. It may be, it is said, that the Exchange is free from the restrictions of the anti-trust laws so long as it confines its activity to matters which relate to securities which are listed on the Exchange; but when it goes beyond these limits and purports to exercise authority over dealers in the over-the-counter market it subjects itself to a charge of violation of the Sherman Act.

There is no justification in the Securities Act for drawing a distinction between the control which the Exchange is called upon to exercise over its members when they are dealing with listed securities and when they are dealing with other securities. On the contrary there are a number of references in the Act to activities connected with unlisted securities or with "any" securities (see e.g. Section 7(c)(2), Section 8(c), Section 10(b)).

The Commission urges that this case be determined "without casting any doubt upon the right and duty of registered stock exchanges to discipline their members who are engaged in practices contrary to just and equitable principles of trade, including violations of the Securities Exchange Act of 1934, and the Commission's rules thereunder, regardless of whether such practices relate to listed or unlisted securities, and whether a non-member may be indirectly adversely affected."[7] The Commission has long recognized that what a member of an exchange does as an over-the-counter dealer has an important connection with his membership in the Exchange. In a number of cases members have been expelled or suspended from membership on securities exchanges as a penalty for derelictions in their over-the-counter business. See e.g. *Walston and Co.*, 7 S. E. C. 937 (1940), modified 9 S. E. C. 660 (1941), petition for review dismissed, 121 F. 2d 1019

[7] Brief of Securities and Exchange Commission, *amicus curiae*, p. 14.

(9th Cir. 1941); *W. K. Archer & Co.*, 11 S. E. C. 635 (1942), aff'd, 133 F. 2d 795 (9th Cir. 1943); *Robert DeForest Boomer*, 13 S. E. C. 102 (1943); *Mason, Moran & Co.*, 35 S. E. C. 84 (1953); *R. L. Emacio & Co.*, 35 S. E. C. 191 (1953).

The New York Stock Exchange is performing a vital public function. Its standing and reputation are important to the national economy.

"The bill proceeds on the theory that the exchanges are public institutions," said the House Committee Report[8] referring to the bill which later became the Securities Exchange Act of 1934.

Mr. Justice Douglas, when he was Chairman of the Securities and Exchange Commission, said:

> "I have always regarded the exchanges as the scales upon which that great national resource, invested capital, is weighed and evaluated. Scales of such importance must be tamper-proof, with no concealed springs—and there must be no laying on of hands. * * * Such an important instrument in our economic welfare * * * must be surrounded by adequate safeguards."[9]

It is highly important for the proper operation of the Exchange as a public institution that its membership and procedures continue to enjoy the confidence of investors. The reputation of the Exchange is a valuable asset from the public point of view. The Exchange must have sufficient power of discipline over its members to enable it to enforce the high standards of conduct which the Act contemplates. If it is to have the requisite power it cannot be hamstrung by an unjustifiable limitation based upon

[8] H. R. Rep. No. 1383, 73rd Con., 2d Sess. 15 (1934).

[9] Douglas, Democracy and Finance (1940) 64, 65.

whether its members are at the moment dealing in listed or in unlisted securities.

We conclude that the statute gives the Commission and the Exchange disciplinary powers over members of the Exchange with respect to their transactions in over-the-counter secu.rities, and that the policy of the statute requires that the Exchange exercise these powers fully. In the exercise of such powers the Exchange is not subject to the restrictions of the Sherman Act.

The next question presented is whether this immunity applies regardless of the correctness or, indeed, reasonableness of a particular decision. Does a securities exchange, while acting within the general scope of its authority to discipline its members, fall into the ambit of the Sherman Act when a particular decision is arbitrary or unreasonable? To find that the Sherman Act applies in such a situation would go far toward defeating the statutory policy of self-regulation. If securities exchanges were in constant danger of subjecting themselves to liability under the anti-trust laws for any misapplication of their disciplinary powers, they would understandably be reluctant to fulfill their obligations under the Securities Exchange Act. Cf. *Booth* v. *Fletcher*, 101 F. 2d 676, 680 (D. C. Cir. 1938), cert. denied, 307 U. S. 628 (1939). When the exchanges are acting other than in "the clear absence of all jurisdiction over the subject matter," *Bradley* v. *Fisher*, 80 U. S. 335, 351 (1871), they are secure from such liability to a person aggrieved by their action. In the exercise of the powers which they are required by the statute to exercise the exchanges must be immune from prosecution under other legislation. Cf. *Gregoire* v. *Biddle*, 177 F. 2d 579 (2d Cir. 1949), cert. denied, 339 U. S. 949 (1950).

What has been said does not mean that if the action of the Exchange was arbitrary or unreasonable appellees are without a remedy. The Exchange is exempt from the

restrictions of the Sherman Act because it is exercising a power which it is required to exercise by the Securities Exchange Act. The availability of judicial review is a necessary concomitant of the exercise of such power. See *Steele* v. *Louisville & Nashville Railroad Company*, 323 U. S. 192 (1944); *Conley* v. *Gibson*, 355 U. S. 41 (1957); Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 401, 769, 800-808 (1958). Compare Administrative Procedure Act § 10a, 5 U. S. C. § 1009(a)(1958). That the statute is silent on the question of judicial review is, of course, not decisive. *Estep* v. *United States*, 327 U. S. 114, 120 (1946).

The lower court, examining the situation for possible application to it of the "rule of reason" under the Sherman Act, found that the Exchange had acted "arbitrarily and unreasonably in directing that plaintiff's wire connections be severed." 196 F. Supp. at 227. Whatever conclusion one might reach on this issue, the procedure of the Exchange in failing to give prior notice of its action and in refusing to inform Silver of the charges made against him and to give him an opportunity to rebut these charges may well be characterized as arbitrary.

The question therefore arises as to whether the judgment below should be affirmed because an injunction might have been available to the plaintiff had the suit sought relief from the Exchange's arbitrary action rather than the remedies provided by the Clayton Act. This is not, however, a case for the application of the accepted rule that a judgment which grants an appropriate remedy will not be reversed merly because the correct result was reached on an erroneous theory. See Fed. Rules Civ. Proc. 54(c); *Mackintosh* v. *Estate of Marks*, 225 F. 2d 211 (3rd Cir. 1955); *Shelly* v. *Union Oil Co.*, 203 F. 2d 808 (9th Cir. 1953). In this case we cannot be certain that, if the plaintiff had not proceeded under the Sherman Act, the parties would not have treated the controversy quite

differently. The plaintiff, for example, might even have sought another remedy. The Exchange might have determined to grant the plaintiff an opportunity to rebut the charges made against him. Had the district court been guided by the principles set forth in this opinion, it might have chosen to hold a hearing and to hear witnesses instead of deciding the issues by summary action and injunction.

We therefore reverse and remand to give the parties and the district court an opportunity to reconsider the case in the light of our opinion.

WATERMAN, *Circuit Judge* (dissenting):

I dissent. I would affirm on the opinion of Judge Bryan below, reported at 196 F. Supp. 209 (S. D. N. Y. 1961).

The majority opinion gives the appellant a significant privilege to which I believe no statute entitles it. Moreover, without mentioning that they have done so, the majority have apparently discredited that portion of the landmark decision of Judge Medina in *United States* v. *Morgan*, 118 F. Supp. 621 at 697 (S. D. N. Y. 1953), in which he discussed the statutory scheme of the Securities Acts of 1933 and 1934 and stated that those acts do not create any implied exemptions from the Sherman Act.

In other provisions of the Securities Exchange Act, namely those sections governing over-the-counter brokers' and dealers' associations, 52 Stat. 1070 (1938), 15 U. S. C. § 78*o*-3 (1958), the draftsmen of our securities statutes provided an explicit exemption from the antitrust laws. 15 U. S. C. § 78*o*-3(n) (1958). The presence of explicit exemptions in certain parts of a statute should make us hesitate to find a congressional intention to create implicit exemptions elsewhere in the same legislation.

Appendix A

In *United States* v. *Borden Co.*, 308 U. S. 188 (1939), involving the scope of the Agricultural Marketing Agreement Act, 7 U. S. C. §§-601-59 (1958), it was argued that by the passage of that regulatory legislation Congress had created an implied exemption from the antitrust laws. The Supreme Court rejected the argument, stating, at pp. 197-198:

> In the opinion of the court below, the existence of the authority vested in the Secretary of Agriculture, although unexercised, wholly destroys the operation of Section 1 of the Sherman Act with respect to the marketing of agricultural commodities.
>
> We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create "so great a breach in historic remedies and sanctions."
>
> It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible.

As a further reason for not reading in any implied exemption in that statute the court also pointed out, at 200-01, that the Agricultural Marketing Act provided explicit exemptions to the antitrust laws in those areas where that was the congressional intention. And in *Georgia* v. *Pennsylvania R.R. Co.*, 324 U. S. 439 (1945), the Court stated, at pp. 456-57:

> These carriers are subject to the anti-trust laws. *United States* v. *Southern Pacific Co.*, 259 U. S. 214. Conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505. Congress by § 11 of the Clayton Act entrusted the Commission with authority to enforce compliance with certain of its provisions "where applicable to common carriers" under the Commission's jurisdiction. It has the power to lift the ban of the anti-trust laws in favor of carriers who merge or consolidate (*New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25-26) and the duty to give weight to the anti-trust policy of the nation before approving mergers and consolidations. *McLean Trucking Co.* v. *United States*, 321 U. S. 67. But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities. Regulated industries are not *per se* exempt from the Sherman Act. *United States* v. *Borden Co.*, 308 U. S. 188, 198 *et seq.* It is true that the Commission's regulation

of carriers has greatly expanded since the Sherman Act. See *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 385-386. But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy. *United States* v. *Borden*, *supra*, pp. 198, 199. None of the powers acquired by the Commission since the enactment of the Sherman Act relates to the regulation of rate-fixing combinations. Twice Congress has been tendered proposals to legalize rate-fixing combinations. But it has not adopted them. In view of this history we can only conclude that they have no immunity from the anti-trust laws.

I believe with Judge Bryan that, as applied to the facts in this case, there is no clear repugnancy between the Securities Exchange Act of 1934 and the Sherman Act, which requires the blanket exemption from the antitrust law which the majority here finds.

The majority believes that it can leave enforcement of the antitrust laws in the hands of the Securities and Exchange Commission despite the fact that that agency's expertise does not involve matters of antitrust law, and it does not appear that Congress intended that the Commission was to be an overseer of the antitrust laws. I do not subscribe to that belief.

APPENDIX B

Statutory Provisions Involved

Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1:

> "Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States, is declared to be illegal * * *."

Section 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a misdemeanor * * *."

Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the antitrust laws * * *, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon * * * a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue * * *."

Section 6 of the Securities Exchange Act of 1934, 48 Stat. 885, 15 U. S. C. § 78f:

> "(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

"(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this chapter, and any amendment thereto and any rule or regulation made or to be made thereunder;

"(2) Such data as to its organization, rules or procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

"(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the 'rules of the exchange'; and

"(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

"(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

"(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.

"(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that

the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

"(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

"(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration."

Section 19(b) of the Securities Exchange Act of 1934, 48 Stat. 898, 15 U. S. C. § 78s(b):

"(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision

against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."